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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. GUMERCINDO GONZALEZ-BASTIDA, Defendant.	Criminal Case No. 08CR0883-JAH Date: April 28, 2008 Time: 8:30 A.m. GOVERNMENT'S RESPONSE AND OPPOSITION TO DEFENDANT'S MOTIONS TO: (1) COMPEL DISCOVERY; (2) DISMISS INDICTMENT FOR INSUFFICIENT ALLEGATIONS; (3) SUPPRESS STATEMENTS; AND (4) LEAVE TO FILE FURTHER MOTIONS. TOGETHER WITH STATEMENT OF FACTS, MEMORANDUM OF POINTS AND AUTHORITIES AND

COMES NOW, the plaintiff, UNITED STATES OF AMERICA, by and through its counsel Karen P. Hewitt, United States Attorney, and A. Dale Blankenship, Assistant U.S. Attorney, hereby files its Response and Opposition to the motions filed on behalf of GUMERCINDO GONZALEZ-BASTIDA ("Defendant"). This Response and Opposition is based upon the files and records of this case.

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I

STATEMENT OF THE CASE

On March 26, 2008, a federal grand jury in the Southern District of California returned a one-count Indictment charging Defendant with Attempted Entry after Deportation, in violation of Title 8, United States Code, Section 1326. Defendant was arraigned on the Indictment on April 1, 2008, and entered a not guilty plea.

II

STATEMENT OF FACTS

A. INSTANT OFFENSE

On March 3, 2008, at approximately 5:40 a.m., United States Border Patrol Agent Isaia Isaia was conducting linewatch duties in the area known as "Bell Valley." This area is approximately 5 miles east of the Tecate, California, Port of Entry and approximately 300 yards north of the United States/Mexico border. Agent Isaia was alerted to the activation of a seismic intrusion device and responded to the area. Upon arriving in the area, Agent Isaia observed footprints leading north toward some bushes. Agent Isaia followed the footprints for approximately 40 yards and observed 8 individuals attempting to conceal themselves in the brush. Agent Isaia approached the individuals and identified himself as a U.S. Border Patrol agent and questioned each individual as to his citizenship and all of the individuals, including Defendant, Gumercindo Gonzalez-Bastida, stated that they were citizens of Mexico illegally in the United States.

Defendant and the other individuals were arrested and transported to the Tecate, California Processing Center. Due to an outage of the Department of Homeland Security Biometric Identification System, identification information for Defendant could not be immediately entered into the system. At approximately 2:45 p.m., the system allowed for the records check to be completed. During this records check, Agents determined that Defendant had a previous criminal and immigration history.

B. POST-MIRANDA STATEMENT

At approximately 4:10 p.m. on March 3, 2008, Border Patrol Agent Luis Martinez advised Defendant of his Miranda rights in the Spanish language during a videotaped interview. The rights advisal was witnessed by Border Patrol Agent Joseph Moore. Defendant indicated that he understood his rights and agreed to answer questions. Defendant stated that he illegally entered the United States with the purpose of traveling to San Bernardino, California, to work and visit his family. Defendant stated that he was a citizen of Mexico, that he does not have any documents that allow him to enter or reside in the United States, and that he has never applied for permission to enter the United States. Defendant acknowledged that his criminal and immigration documents were true and correct and that he had previously been in prison.

Defendant signed an affidavit stating that he is a citizen of Mexico; that he has no documents to enter the United States; that he was previously deported; and that he did not apply to the Attorney General for permission to re-enter the United States.

C. DEFENDANT'S CRIMINAL HISTORY

On April 12, 2002, Defendant was convicted of 2 counts in a multi-count information relating to the manufacture of methamphetamine. Defendant was convicted of manufacturing methamphetamine in violation of Cal. Penal Code § 11379.6(a) (Count 1); and possession of methamphetamine while armed in violation of Cal. Penal Code § 11370.1(A) (Count 8). Defendant was sentenced to 7 years' prison on Count 1; and 3 years on Count 8; the sentences on each count were run concurrent. Defendant's sentence was enhanced an additional 3 years for possession of a firearm in the commission of the offense in Count 1. This enhancement resulted in a total sentence of 10 years' prison.

D. DEFENDANT'S IMMIGRATION HISTORY

Defendant was ordered removed from the United States by an immigration judge on October 6, 2006. Defendant was removed pursuant to that order on October 13, 2006 via the San Ysidro, California, Port of Entry.

III

DISCUSSION

A. THE GOVERNMENT WILL COMPLY WITH ALL DISCOVERY OBLIGATIONS

The United States has and will continue to fully comply with its discovery obligations under

Brady v. Maryland, 373 U.S. 83 (1963), the Jencks Act (18 U.S.C. 3500), and Rule 16 of the Federal Rules of Criminal Procedure.[1/] To date, the United States has produced 42 pages of discovery, and 1 cd to Defendant's counsel including investigative reports. The Government will produce a copy of the deport tape as soon as it is received. As of today, the United States has received no reciprocal discovery. The Government anticipates that all discovery issues can be resolved amicably and informally, and requests that no order be entered compelling specific discovery in light of the Government's position below.

1. Defendant's Statements

The United States recognizes its obligation under Federal Rules of Criminal Procedure ("Rules") 16(a)(1)(A) and 16(a)(1)(B) to provide to Defendant his written statements and the substance of Defendant's oral statements. The United States has produced all of Defendant's statements that are known to the undersigned Assistant U.S. Attorney at this time. If the United States discovers additional oral or written statements that require disclosure under the relevant Rules, such statements will be promptly provided to Defendant.

2. Arrest Reports

The United States does not object to this request and has already produced to Defendant all arrest reports known to the Government at this time.

3. Prior Record

The United States has provided Defendant with a copy of his known prior criminal record under Rule 16(a)(1)(D). See United States v. Audelo-Sanchez, 923 F.2d 129, 130 (9th Cir. 1990). Should the United States determine that there are any additional documents pertaining to the Defendant's prior criminal record, those will be promptly provided to Defendant.

4. Evidence Seized

The United States has complied and will continue to comply with Rule 16(a)(1)(E) in allowing Defendant an opportunity, upon reasonable notice, to examine, inspect, and copy all evidence seized that is within its possession, custody, or control, and that is either material to the

[1] Unless otherwise noted, all references to "Rules" refers to the Federal Rules of Criminal Procedure.

preparation of Defendant's defense or is intended for use by the United States as evidence during its case-in-chief at trial, or was obtained from or belongs to Defendant.

5. Tangible Objects

The United States has complied and will continue to comply with Rule 16(a)(1)(E) in allowing Defendant an opportunity, upon reasonable notice, to examine, inspect, and copy tangible objects that are within its possession, custody, or control, and that is either material to the preparation of Defendant's defense or is intended for use by the United States as evidence during its case-in-chief at trial, or was obtained from or belongs to Defendant. The United States, however, need not produce rebuttal evidence in advance of trial. See United States v. Givens, 767 F.2d 574, 584 (9th Cir. 1984).

6. Preservation of Evidence

As stated above, the United States will preserve all evidence to which the Defendant is entitled pursuant to the relevant discovery rules.

7. Reports of Examinations and Tests

The United States will provide Defendant with any scientific tests or examinations in accordance with Rule 16(a)(1)(F).

8. Expert Witnesses

The United States will comply with Rule 16(a)(1)(G) and provide Defendant with a written summary of any expert testimony that the United States intends to use during its case-in-chief at trial under Federal Rules of Evidence 702, 703 or 705. The Government will introduce expert testimony regarding fingerprint comparison. The Government anticipates that the expert will testify that any fingerprints taken as a result of this court's order to take fingerprint exemplars from Defendant will match the fingerprints on Defendant's A-file documents.

9. Brady Material

The United States has complied and will continue to comply with its discovery obligations under Brady v. Maryland, 373 U.S. 83 (1963).

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10. Giglio Material

The United States has complied and will continue to comply with its discovery obligations under Giglio v. United States, 405 U.S. 150 (1972).

11. Henthorn Material

The United States will comply with its obligations under United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991), and request that all federal agencies involved in the criminal investigation and prosecution review the personnel files of the federal law enforcement inspectors, officers, and special agents whom the United States intends to call at trial and disclose information favorable to the defense that meets the appropriate standard of materiality. United States v. Booth, 309 F.3d 566, 574 (9th Cir. 2002) (citing United States v. Jennings, 960 F.2d 1488, 1489 (9th Cir. 1992)). If the undersigned Assistant U.S. Attorney is uncertain whether certain incriminating information in the personnel files is "material," the information will be submitted to the Court for an in camera inspection and review. The United States objects to the disclosure of personnel files to the Defendant.

12. Jencks Act Material

The United States will comply with its discovery obligations under the Jencks Act, Title 18, United States Code, Section 3500, and as incorporated in Rule 26.2.

13. Cooperating Witnesses

At this time, the United States is not aware of any confidential informants or cooperating witnesses involved in this case. The Government must generally disclose the identity of informants where: (1) the informant is a material witness, and (2) the informant's testimony is crucial to the defense. Roviaro v. United States, 353 U.S. 53, 59 (1957). If there is a confidential informant involved in this case, the Court may, in some circumstances, be required to conduct an in camera inspection to determine whether disclosure of the informant's identity is required under Roviaro. See United States v. Ramirez-Rangel, 103 F.3d 1501, 1508 (9th Cir. 1997). If the United States determines that there is a confidential informant or cooperating witness involved in this case, the United States will either disclose the identity of the informant or submit the informant's identity to the Court for an in camera inspection.

14. 404(b) Material

The United States will disclose, in advance of trial, the general nature of any "other bad acts" evidence that the United States intends to introduce at trial pursuant to Federal Rule of Evidence 404(b).

15. Witnesses

The United States will provide a list of witnesses in its trial memorandum. The grand jury transcript of any person who will testify at trial will also be produced. The United States objects to providing the addresses of the Agents involved with the apprehension of Defendant. The names of the Border Patrol Agents involved in the apprehension of the Defendant are included in the reports previously disclosed in discovery. Those agents can be contacted by addressing correspondence to the United States Border Patrol, Customs and Border Protection, Department of Homeland Security.

16. Alien File

The United States will make Defendant's A-file available for inspection at a time mutually convenient to the parties and will continue to perform its duty under Brady and the discovery rules to disclose all material exculpatory information or evidence favorable to Defendant that is contained in the A-File. The documents in the A-File are not exculpatory. Most of the documents are highly incriminating in nature. The documents include numerous documents related to Defendant's immigration history and his criminal history. The documents establish that Defendant is an illegal alien with a felony criminal record who has been legally deported, removed from the United States, admonished of the criminal sanctions under 8 U.S.C. § 1326, and, despite the prior warnings, subsequently reentered the United States without applying for permission. The Government will provide all documents that fall within the scope of Rule 16.

B. THE INDICTMENT IS SUFFICIENT

Defendant argues that the Court should dismiss the indictment because it does not allege all of the necessary elements, specifically, Defendant argues that the fact of Defendant's prior aggravated felony conviction must be alleged in the indictment. In the alternative, Defendant argues that the maximum penalty for a conviction for this offense is limited to 2 years' custody.

This interpretation of 8 U.S.C. § 1326(b) is foreclosed by Almendarez-Torres v. United States, 523 U.S. 233, 235 (1998) which holds that the subsections under 1326(b) are not separate crimes, but sentencing factors that need not be alleged in the indictment. Defendant's arguments are foreclosed by Almandarez-Torres and subsequent Ninth Circuit caselaw applying the holding in Almendarez-Torres. United States v. Martinez-Martinez, 295 F.3d 1041, 1043 (9th Cir. 2002) (rejecting argument that "§ 1326 is unconstitutional under Apprendi"); United States v. Fresnares-Torres, 235 F.3d 481, 482 (9th Cir. 2000) ("Apprendi therefore preserved the specific holding of Almendarez-Torres . . . that 8 U.S.C. § 1326(b)(2) -- the subsection increasing the penalty for previous deportation following conviction of an aggravated felony -- was a mere penalty provision for recidivist behavior and did not define a separate offense."); United States v. Bonilla-Mungia, 422 F.3d 316, 318-19 (5th Cir. 2005) (rejecting argument that the sentencing enhancement provisions of 8 U.S.C. § 1326(b) are facially unconstitutional because Almendarez-Torres has been undercut by Apprendi).

Almendarez-Torres "stands for the proposition that not every fact expanding a penalty range must be stated in a felony indictment, the precise holding being that recidivism increasing the maximum penalty need not be so charged." Pacheco-Zepeda, 234 F.3d at 413-14 (quoting Jones v. United States, 526 U.S. 227, 248 (1999)). See also, United States v. Valle-Montalbo, 474 F.3d 1197, 1201 (9th Cir. 2007); United States v. Tighe, 266 F.3d 1187, 1191 (9th Cir. 2001) ("Under the current state of the law, the Constitution does not require prior convictions that increase a statutory penalty to be charged in the indictment."); United States v. Reyes-Pacheco, 248 F.3d 942, 944 (9th Cir. 2001) ("The district court did not err by considering Reyes-Pacheco's prior aggravated felony conviction despite the fact that such conduct was . . . [not] charged in the indictment.")

Because the subsection (b) factors are penalty provisions, they need not be alleged in the indictment. The indictment was not, therefore, insufficient.

C. DEFENDANT'S MOTION TO SUPPRESS STATEMENTS SHOULD BE DENIED

Defendant moves to suppress all statement. This request should be denied. Defendant's field admissions are admissible as made within a routine border inspection. Defendant's field admissions were not made during a custodial interrogation, and Defendant's statements made after being advised of, and waiving, his Miranda warnings were voluntary. For these reasons, the Motion should be denied.

1. Defendant Has Failed to Provide a Sworn Declaration

Under Ninth Circuit and Southern District precedent, as well as Southern District Local Criminal Rule 47.1(g)(1)-(4), a defendant is entitled to an evidentiary hearing on a motion to suppress only when the defendant adduces specific facts sufficient to require the granting of the defendant's motion. United States v. Batiste, 868 F.2d 1089, 1093 (9th Cir. 1989) ("[T]he defendant, in his motion to suppress, failed to dispute any material fact in the government's proffer. In these circumstances, the district court was not required to hold an evidentiary hearing."); United States v. Moran-Garcia, 783 F. Supp. 1266, 1274 (S.D. Cal. 1991) (stating that boilerplate motion containing indefinite and unsworn allegations was insufficient to require evidentiary hearing on defendant's motion to suppress statements). Specifically, Local Criminal Rule 47.1(g)(1) states that "[c]riminal motions requiring predicate factual finding shall be supported by declaration(s)" and that "[t]he Court need not grant an evidentiary hearing where either party fails to properly support its motion for opposition." Here, Defendant has failed to support his allegations with a declaration, in clear opposition to Local Rule 47.1(g). The Ninth Circuit has held that a District Court may properly deny a request for an evidentiary hearing on a motion to suppress evidence because the defendant did not properly submit a declaration pursuant to a local rule. United States v. Wardlow, 951 F.2d 1115, 1116 (9th Cir. 1991).

2. Defendant's Immigration Inspection Statements Are Admissible

Defendant's statements made prior to his arrest were made in the context of routine border questioning by a United States Border Patrol Agent, the type of questions which have been found by the Supreme Court and the Ninth Circuit to be insufficient to trigger constitutional protections. Detaining a person for routine border questioning is not custodial. United States v. Troise, 796 F.2d 310, 314 (9th Cir. 1986); see also United States v. Galindo-Gallegos, 244 F.3d 728, 731 (9th Cir.), modified by 255 F.3d 1154 (9th Cir. 2001). The Miranda requirement applies only when a defendant is in custody and undergoes custodial interrogation. The police do not need to give

Miranda warnings before the defendant is in custody. United States v. Booth, 669 F.2d 1231, 1237 (9th Cir. 1981).

Defendant alleges that his pre-arrest immigration inspection statements should be suppressed because he was not Mirandized. The facts in this case indicate that Defendant was not in custody during the immigration inspection and therefore Miranda would not apply. Defendant was reasonably detained while the agent conducted an ordinary immigration inspection. The law clearly indicates that being detained for this purpose is permissible. See Stansbury v. California, 114 S.Ct. 1526 (1994) (defendant must be "in custody" to trigger need for Miranda warnings); Berkemer v. McCarty, 468 U.S. 442 (1984) (police officer whose "observations lead him reasonably to suspect" that an individual has committed a crime, may briefly detain that person to investigate the circumstances that provoked the officer's suspicions); United States v. Manasen, 909 F.2d 1357, 1358-59 (9th Cir. 1990) (routine questioning by customs officials is normally not custodial interrogation that triggers Miranda); United States v. Troise, 796 F.2d 310, 314 (9th Cir. 1986) (same); United States v. Woods, 720 F.2d 1022 (9th Cir. 1983) (brief questioning at airport based upon reasonable suspicion did not trigger Miranda).

Here, Agent Isaia encountered Defendant just north of the United States-Mexico border. The agent questioned Defendant as to his citizenship and right to be in the country. Defendant, responded that he was a citizen of Mexico with no legal right to be in the United States. Pennsylvania v. Muniz, 496 U.S. 582, 601-04 (1990) (even if incriminating, answers elicited prior to Miranda warnings during procedures "necessarily attendant to the police procedure [are] held by the court to be legitimate" and admissible). During this questioning, Defendant was not placed in handcuffs or searched. All statements prior to Defendant's arrest are admissible.

3. Collecting Defendant's Biographical Data Is Not Interrogation

"[T]his court and the Supreme Court generally do not view inquiries regarding general biographical information as 'interrogation.' " United States v. Foster, 227 F.3d 1096, 1103 (9th Cir. 2000) (even after Miranda warnings) (citing Pennsylvania v. Muniz, 496 U.S. 582 (1990) (plurality opinion)). See also Booth, 669 F.2d at 1238 ("Ordinarily, the routine gathering of background biographical data will not constitute interrogation."). This is so, provided that the questions are not "reasonably likely to elicit an incriminating response from the suspect." Booth, 669 F.2d at 1237.

As noted in Foster, "initial biographical questions at the first port of entry [do] not amount to the initiation of interrogation" which must be preceded by Miranda warnings and a waiver. Foster, 227 F.3d at 1103. Here, Defendant was not subjected to Miranda-type interrogation. After Defendant was transported to the border patrol station, the Agents collected routine booking information, and took Defendant’s fingerprints. Therefore, the Agents did not need to administer Miranda warnings before collecting biographical information from Defendant.

4. Defendant’s Post-Arrest Statements Were Voluntary

A statement made in response to custodial interrogation is admissible under Miranda v. Arizona, 384 U.S. 437 (1966) and 18 U.S.C. § 3501 if a preponderance of the evidence indicates that the statement was made after an advisement of rights, and was not elicited by improper coercion. See Colorado v. Connelly, 479 U.S. 157, 167-70 (1986) (preponderance of evidence standard governs voluntariness and Miranda determinations; valid waiver of Miranda rights should be found in the “absence of police overreaching”). Although the totality of circumstances, including characteristics of the defendant and details of the interview, should be considered, improper coercive activity must occur for suppression of any statement. See id. (noting that “coercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary’”); cf. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) (“Some of the factors taken into account have included the youth of the accused; his lack of education, or his low intelligence; the lack of any advice to the accused of his constitutional rights; the length of detention; the repeated and prolonged nature of the questioning; and the use of physical punishment such as the deprivation of food or sleep.”) (citations omitted). While it is possible for a defendant to be in such a poor mental or physical condition that they cannot rationally waive their rights (and misconduct can be inferred based on police knowledge of such condition, Connelly, 479 U.S. at 167-68), the condition must be so severe that the defendant was rendered utterly incapable of rational choice. See United States v. Kelley, 953 F.2d 562, 564 (9th Cir.1992) (collecting cases rejecting claims of physical/mental impairment as insufficient to prevent exercise of rational choice).

5. Defendant's Statements Were Voluntary and Made After a Knowing, Intelligent, and Voluntary Waiver

Defendant's post-arrest statements are admissible because he knowingly, intelligently, and voluntarily waived his Miranda rights. As discussed previously, a statement made in response to custodial interrogation is admissible under Miranda v. Arizona, 384 U.S. 437 (1966), and 18 U.S.C. § 3501, if a preponderance of the evidence indicates that the statement was made after an advisement of rights, and was not elicited by improper coercion. Colorado v. Connelly, 479 U.S. 157, 167-70 (1986) (preponderance of evidence standard governs voluntariness and Miranda determinations; valid waiver of Miranda rights should be found in the "absence of police overreaching"; "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' ").

Here, the undisputed facts are that Defendant knowingly and voluntarily waived his Miranda rights. Defendant was properly advised of his Miranda rights following arrest. Defendant acknowledged that he understood his rights, both verbally and in writing, and he agreed to answer questions without the presence of an attorney. Defendant's Miranda advisal and subsequent interview were videotaped and the video was turned over to Defendant's counsel. Defendant makes no specific allegation of any coercive conduct on the part of the interviewing officers. Neither does Defendant claim to have been intimidated, threatened, or coerced in any manner by the interviewing officers. Defendant fails to allege with any specificity that the Miranda advisal and waiver were improper. The totality of circumstances demonstrates that Defendant's post-arrest, Mirandized statements were voluntary. Defendant's Motion for a voluntariness hearing should be denied.

6. Six Hour Safe Harbor Rule

Defendant does not allege that his post-Miranda statement was taken outside of the six-hour "safe harbor" provision of Title 18, Section 3501(c). However, it appears from the reports that there was a delay in interviewing the Defendant from the time of his apprehension at 5:45 a.m. until 4:20 p.m. According to Section 3501, there is a "safe harbor" after arrest and before arraignment during which a confession will not be excludable solely due to delay. United States v. Van Poyck, 77 F. 3d 285, 288 (9th Cir. 1996). Statements made outside the safe harbor may be excluded solely for delay, but a court is not obligated to do so. Id.; United States v. Shoemaker, 542 F.2d 561, 563(10th

Cir. 1976)("non-compliance with the six hour rule does not ipso facto render a confession inadmissible"); 18 U.S.C. § 3501(b) (timing is just one factor that "need not be conclusive"). "We will admit a statement made outside of the safe harbor if the delay was reasonable or if public policy concerns weigh in favor of admission." United States v. Padilla-Mendoza, 157 F.3d 730, 731 (9th Cir. 1998)(citing Van Poyk, 77 F.3d at 289). Relevant policy concerns include discouraging officers from unnecessarily delaying arraignments, preventing the admission of involuntary confessions, and encouraging early processing of defendants. Id.

a. Even if the six-hour rule was violated suppression is still not warranted

In this case the delay was reasonable. As indicated above, Defendant was arrested between at approximately 5:45 a.m., on March 3, 2008. After his arrest, USBP Agents transported Defendant to the Tecate Processing Center. At 4:20 p.m., on March 3, 2008, USBP Agents read Defendant his Miranda rights in the Spanish language, whereupon Defendant elected to waive his Miranda rights and make a statement.

Defendant was apprehended with 8 other individuals and each was transported to the Tecated Processing Center. Due to a national outage of the Department of Homeland Security Biometric Identification System, Defendant's information could not be entered into the system. At approximately 2:45 p.m., the records checks were finally returned and indicated that Defendant had a prior immigration and criminal history. At approximately 4:20 p.m., the Defendant was advised of his Miranda rights and agreed to speak to the agents. The system outage caused the delay and the delay was not unreasonable. Defendant was interviewed approximately 10.5 hours after his apprehension. The Border Patrol agents did not intentionally delay the interview, rather, the system outage prevented them from obtaining critical information prior to proceeding with an interview of Defendant.

In addition, there was no prejudice to Defendant. There was no evidence that Defendant was groggy, fatigued or disoriented, or even cranky because of the delay. Defendant was, in fact, calm and cooperative. Defendant never complained about the delay nor did he demand a quicker interview. There was a reasonable explanation for the delay and Defendant's statements are admissible. Van Poyk, 77 F. 3d at 289 ("if [the delay] is reasonable, the statement is admissible").

Also, public policy concerns weigh in favor of admission. This is not a case where an officer deliberately postponed an interview to interrogate Defendant at a disadvantage. Agent Perez did not prolong the interview process in order to obtain a confession from Defendant. Rather, his efforts were hampered by an outage of the Biometric Identification Systeme. Because Agent Perez did not act improperly, no public policy concerns would be advanced by suppression.

b. Defendant's interview was not impermissibly delayed

This case is distinguishable United States v. Wilson, 838 F.2d 1081 (9thCir. 1988) where the court held that the delay was impermissible. In Wilson, the defendant was arrested at 7:55 p.m. the day prior to his arraignment and the FBI was notified immediately. Defendant was not questioned by FBI agents until approximately 1:30 pm. on the day of his arraignment, and the interview lasted until 4:00 p.m. Id. at 1083. The FBI agent investigating the case was interviewing the defendant during the arraignment calendar and one of the local officers made special arrangements to have the defendant arraigned in the judge's chambers after the conclusion of the interview. Id. at 1085. In determining that the statement should be suppressed, the Wilson court found that: "the only purpose for evading the statutory duty to have the defendant arraigned promptly was to get the confession first." Id. at 1086. The facts of this case are quite different. Here the Border Patrol Agents were hampered by the system outage.

In United States v. Gamez, 301 F.3d 1138 (9thCir. 2002) the court found that a defendant's statements taken outside the six-hour safe harbor during a 31-hour detention were admissible. Id. at 1143. In reaching that determination, the court found that the 31-hour detention was reasonable and that the defendant could not have been interrogated earlier because a Spanish speaking FBI agent was not available. Further, it was not possible to determine with what offense to charge defendant prior to his interrogation. Id. at 1143. Similarly, in this case, without the benefit of Defendant's immigration and criminal history, it was not possible for agents to determine the appropriate charge prior to his interview.

In Gamez, the delay was one of the factors the court considered when determining if the confession was voluntarily given. ("Gamez contends that his statements to the FBI were involuntary because of the coercive nature of his interrogations and the circumstances surrounding his detainment. We think not." Gamez 301 F.3d at 1144. (See also United States v. Christopher, 956 F.2d 536, 539 (6thCir. 1991) "Finding no malevolent purpose behind the pre-arraignment delay and no lengthy, hostile or coercive interrogation that would have rendered defendant's statements involuntary, we find no error in the admission of defendant's statements into evidence.) In this case, the Defendant's statements were voluntarily given, the delay in conducting the interview was not for an improper purpose, the amount of delay was reasonable and there are no public policy concerns that warrant suppressing Defendant's statement.

D. LEAVE TO FILE FURTHER MOTIONS

The United States does not oppose Defendant's request for leave to file further motions, so long as such motions are based on discovery previously unavailable to Defendant.

IV

CONCLUSION

For the foregoing reasons, the United States requests that the Court deny Defendant's motions.

Dated: April 20, 2008.

Respectfully Submitted,

KAREN P. HEWITT
United States Attorney

S/ A. Dale Blankenship
A. DALE BLANKENSHIP
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. GUMERCINDO GONZALEZ-BASTIDA, Defendant.	Criminal Case No. 08CR0883-JAH **CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED THAT:

I, A. DALE BLANKENSHIP, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of **GOVERNMENT'S RESPONSE AND OPPOSITION TO DEFENDANT'S MOTIONS:**

1. COMPEL DISCOVERY;
2. DISMISS INDICTMENT FOR INSUFFICIENT ALLEGATIONS;
3. SUPPRESS STATEMENTS;
4. LEAVE TO FILE FURTHER MOTIONS.

on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Sylvia Baiz, Esq.

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

None

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 20, 2008.

s/ A. Dale Blankenship
A. DALE BLANKENSHIP